

How the EU is Becoming a Rule-of-Law-less Union of States

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2021-04-28T08:42:37

While the content of the [new anti-constitutional doctrine in Poland](#) has been firmly established, what keeps changing are the plots, characters and the doctrine's reach. The annihilation of [the independent Constitutional Court](#), repeated attacks on the [common courts](#), the National Council of the Judiciary, and [the Supreme Court](#), are only elements of this [methodical capture of the state](#). The most recent attempt by the executive to undermine the very foundations of the Union legal order by turning yet again to the discredited and shameless cohort once known as the Constitutional Court speaks volumes about how far the politics of resentment have come since 2015. With the fake court about to hand the government its desired excuse to [ignore interim measures of the Court of Justice of the European Union](#) ("the Court"), a point of no return might have been reached. We should no longer be talking about creeping, but rather galloping POLEXIT (for my earlier iterations on the topic see [here](#), [here](#), [here here](#)).

It might seem indeed that everything has been already said and written on the subject. However, we might be on the brink of a new phase in the constitutional retrogression. This new phase sees the dismantling of the rule of law on the domestic front being reinforced, aided and abetted now by the legitimizing inaction and/or [spineless bargaining](#) at ... the supranational level. This is no longer the classic and often-heard excuse "we need more dialogue". Rather, the EU through its institutions is playing the game according to the rules dictated by the smart autocrats. Unthinkable? For Jean Monnet possibly, but for Ursula von der Leyen not anymore.

Constitutional Pessimism: The Domestic

With the relentless attacks on the Court and the EU judicial system that followed into the footsteps of the [emasculatation of constitutional review](#) and incapacitation of the judiciary, the liberal paradigms that shaped Polish democratic transformations in, and post, 1989 have been called into question. Yet, attacks on the Court not only marginalize Poland within the wider political community and ultimately push it out of the EU, but they also transform a Polish citizen back into a servant of the state and a second-class European citizen, deprived of the protection offered by European law and the Court. It is a return to a world in which a citizen has no chance –but is supposed to live in the shadow of "[a constitution of fear](#)".

This is where the existential clash of two worlds come to the head. Thanks to European law, a citizen lives "on the frontier" and no longer belongs exclusively to the territory delimited by the borders of "his or her" state. European law has survived for more than half a century precisely because it has been applied to individual

citizens' cases in the local courts of the member states. The [spirit of](#) European law is more than a slick-sounding metaphor. It stands for liberating the citizen from the straitjacket of the all-powerful state in whose shadow the citizen has lived so far. The contradiction between the European vision and an ideal, and the doctrine that the ruling party in Poland lives and breathes, is therefore fundamental. While, according to the Law and Justice party ("PiS"), the citizen is to live under the watchful eye of the state that is always right in interfering with his or her rights, post-war Europe promotes a constitutional culture of restraint and moderation. While the "PiS state" strives at all costs to squeeze the citizen into the state framework, the Union frees us from this framework and opens up new opportunities. While European law gives one a chance to win with the powerful state, in a dispute between the "PiS state" and the citizen, the former would like to see its EU obligations as a worthless piece of paper. For PiS, a good citizen is a controlled citizen.

Citizens must understand that electing a party that rejects the separation of powers and tolerance for others, that promotes chauvinism and divisions while elevating distrust, pettiness, and the desire for revenge to the rank of political "virtues", comes at a cost that will one day have to be paid. Citizens who care about Europe and Poland in Europe cannot agree to the rejection of the fundamental core of the integration and European law.

Who would have thought that sixteen years after Poland's accession to the EU, it would be necessary to remind us about the foundations of the EU legal order, to which we have committed ourselves voluntarily, and that such a discussion would take on existential importance. Today we live not only in a state devoid of any checks and balances. We live in a state in which the authorities can do virtually anything, all this in times of an epidemiological catastrophe, which is used as a convenient excuse to further consolidate power and curtail civil rights. The efforts of the last five years to take over independent institutions are falling in a ghastly logical whole at the worst possible moment for both Europe and our civic rights and liberties.

While the financial crisis and Brexit are undoubtedly events that make us reflect on the future of the European Union and the optimal model of European integration, the crisis of values in the form of one member state of the EU undermining liberal democracy, the rule of law, and the rights of minorities as well as attacks on independent courts, strike at the very axiological foundations of the Union and question its continuity. Thinking about Europe in terms of community and values that bind European states and nations is of particular importance in Poland in A.D. 2021. The "Polish constitutional tragedy" of the last five years must be a constant warning against the civil *non possumus* and the disastrous consequences of turning away from Europe, with all its flaws and imperfections. As I write these words, the time has come to finally recognize that the entire post-1989 constitutional profile of Poland has been irrevocably affected. Tinkering here and there, while foolishly hoping that the EU will come to our rescue, must be finally thrown out the window.

Constitutional Pessimism: The Supranational

The respect for courts and their decisions and the trust in the reformatory power of law have been at the forefront of the European integration and defined the post-war liberal consensus. The authority of one court for the whole Union, the binding nature of its rulings and the emancipation of national courts as courts of general jurisdiction in the sphere of Union law were essential parts of the original consensus that paved the way for the first Communities. The destructive and antagonising self-help was ruled out and so was the contractual principle *do ut des* according to which “I perform as long as you perform”. Rather it was left to the courtroom with its own logic, argumentative framework(s) and a set of principles, to define the content and extent of the obligations undertaken on Accession day. For the community of law to survive, any unilateral action by the states was to be banished from the Community vernacular. The post war liberal constitutionalism has been firmly anchored in “never again”, underpinned in turn by three fundamental propositions: i) the Constitution is the ultimate law of the land that ii) disciplines the fleeting majorities through the regime of constitutional rights and independent institutions. Last but not least, iii) every political power is a power constrained by courts. The supranational courts (the Court and the ECtHR) would have a special constraining role to play here. The “community of law” seemed to be a non-negotiable feature that truly distinguished “the ever-closer union among the peoples of Europe”.

Do all these assumptions still stand and explain the core of what the EU is all about? Unfortunately, the cowardice and blatant incompetence of the European Commission and the spinelessness of its leadership, paint a rather disturbing picture and do not help – to say the least – those among us on the ground in Poland who still believe, and want to believe, in the peaceful, united and integrated Europe as a value that keeps European peoples together. It is time to shout out bluntly that today it is the collective malaise and escapism of the EU institutions that enable the capture that marches on and produce effects that are and [will be impossible to roll back](#). Rome has been burnt and yet the Commission continues to fiddle by dialoguing with the arsonists, by slavishly sticking to its futile repertoire of grand gestures and press releases full of empty promises ... Is anybody in Brussels still following the real time events? Has turning the other cheek simply become the new normal for the European bureaucrats? The shameless pact of [selling the rule of law to save the budget](#) (it is a mild description of the Commission’s capitulation and institutional humiliation) only corroborates that the once proud guardian of the Treaties has become a puppet at the hands of the Member States. It is high time to recognize this and call a spade a spade, rather than keep pretending that Commissioner Jourova might have something interesting to say other than repeating platitudes. Once cherished, “community of law” becomes an empty slogan. From a non-negotiable asset, it has been downgraded to yet another card to be played and traded should the institutional calculus so demand. The “community of law” has been hijacked and no longer serves as the guiding star for actions of the institutions. Right before our eyes the EU is becoming a rule-of-law-less union of states.

E(U)EXIT?

We have focused too much on how the capture in Poland has changed the constitutional profile of that state. Given the ample evidence the time has now come to recognize that the deliberate process of removing “[the community of law](#)” component from the Union legal order alters the constitutional profile of ... the Union itself.

When law and institutions begin to serve ruthless politics, instead of civilizing and constraining it, one of the foundations of the post-war European order is destroyed: the belief that any political power must be limited and controlled by institutions independent of it, above all, the courts. By not counteracting, the European institutions have either marginalized themselves ([MEPs’ embarrassing acquiescence](#) to the creeping illegality) or made a mockery of the institutional principles of the EU law and the treaty enforcement toolkit (the Council). Now the Commission adds to this sorry state of things a self-inflicted and readily accepted humiliation at the hands of the European Council. Indeed, the European constitutional tragedy sees the Commission becoming part of the problem, rather than a solution ... This is as bad as it gets. In the end of the shameless pandering to the wishes of autocrats and reneging on the rule of law, “the community of law” is taken out of the European Union’s parlance altogether. The European Union stands hollowed out and bereft of any ideals going beyond the internal market. With the “community of law” happily brushed aside by the institutions and the unbound Masters of the Treaties (for earlier signs of this creeping attack by the member states on “the community of law” see [here](#)), we are staring into the eyes of E(U)XIT: Institutions that were designed to act as the safety-valve and emergency brake against the authoritarian impulses of states, are now playing their own part in enabling and shepherding the dangers they were supposed to avert.

All this European procrastination and the ultimate dereliction of duties by those who should be at the forefront of saving the last remnants of the European rule of law and legal credibility, unfolds to the accompaniment of sovereign war rhetoric at the domestic level. Here the soloists are representatives of the government, outdoing themselves in ignorance, judicial brawling, and tearful martyrdom scenes in the hope that their electorate will notice and appreciate it. This is a spectacle in which a pseudo-constitutional court speaks about the compliance of the preliminary ruling procedure with the Polish Constitution and creates the appearances of legality ...

Constitutional pessimism combined

And the EU is watching all this while sending a new flurry of protest letters and concocting risible “compromises” with the autocrats. Certainly, for Commissioner Jourova and her colleagues every day is business as usual and today has been yet another day in office ... This is exactly how and when domestic POLEXIT meets supranational E(U)EXIT. This is not yet another allegoric figure (which I very much wish it would be) but rather a matter-of-fact recognition of surrounding tragic reality. We are living in times which favour constitutional bad faith, dishonesty and

comfortable looking the other way when something should have and must have been said and done even if only for symbolic reasons. In times like these, constitutional symbols of decency and resilience do matter more than ever and yet we have none left to fall back on. The constitutional decay moves beyond the domestic and spills over into the supranational. This is the ultimate statement in pessimism. We must be very clear about where we are today.

